IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1680

THE STATE OF MICHIGAN,

Petitioner,

v.

GARY DeFILLIPPO,

Respondent.

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I.

WHETHER THE DETROIT STOP AND IDENTIFY ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE RIGHT TO DUE PROCESS OF LAW, THE RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, AND THE PRIVILEGE AGAINST SELF-INCRIMINATION?

II.

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CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and

> to petition the government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On Sunday evening, August 15, 1976, a rock concert at Detroit's Cobo Hall was disrupted by an "unruly mob of teenagers."[1] Police called to the scene were unable to quell what was described as "something close to a riot"[2] and by midnight forty-seven persons had been arrested on charges of sexual attacks, robberies and assaults.[3] City administration officials demanded a quick response.[4]

The Detroit Common Council, then in summer recess, called an emergency meeting for Wednesday, August 18, 1976. At the suggestion of the Law Department of the City[5]

[1]*Detroit News*, Monday, August 16, 1976, Page 1A.

[2]Deputy Mayor William J. Beckham, Jr., quoted in the *Detroit Free Press*, Tuesday, August 17, 1976, Page 1A.

[3]*Detroit News*, Monday, August 16, 1976, Page 1A.

[4]Deputy Mayor Beckham quoted vacationing Mayor Coleman Young as saying, "I want the pimps, prostitutes, gangs and youth rovers off the streets. We're going to rid the city of them — beginning tonight." The Detroit Common Council was given until Thursday, August 19, to act or the Mayor would declare a limited state of emergency. *Detroit Free Press*, Tuesday, August 17,1976, Page 1A.

Robert Pisor, Mayor Young's press secretary stated: "The line has been drawn on gangs. If that line was crossed last nght (at Cobo Hall), we want to know why no heads were cracked." *Detroit News*, Monday, August 16, 1976, Page 1A.

[5]A letter from Richard L. Manetta, Assistant Corporation Counsel to the Detroit Common Council, provided in part:

> "After several incidents involving the blatant and utter disregard for the law by several gangs of minors, the latest one having occurred last Sunday night, August 15, 1976, at Cobo Hall, the Mayor has decided to take several steps to counteract the reckless actions of these minors. To this end, you will find attached an emergency ordinance...
>
> "With the cooperation of the Legislative Branch, this City will meet its most recent challenge and the streets of the Detroit will be safe once again." Journal of the City County, August 18,1976, p. 1677.

a new curfew was enacted[6] and Detroit's "Stop and Frisk" ordinance was amended making it illegal for any person stopped pursuant to that section to refuse to identify himself and provide verifiable documents or other evidence of such identification to a police officer.[7]

[6]Chapter 36, Article 3, Section 1 and 2, City of Detroit Municipal Code.

[7]ORDINANCE NO. 143-H, CHAPTER 39, ARTICLE I, AUTHORITY OF POLICE OFFICERS TO STOP AND QUESTION SUSPICIOUS PERSONS, AN ORDINANCE to amend Chapter 39, Article I of the Code of the City of Detroit by amending Section 39-1-52.3 to provide that it shall be unlawful for any person stopped pursuant to this section to refuse to identify himself to the police officer.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

WHEREAS the "Stop and Frisk" ordinance authorizes a police officer to conduct an investigation for criminal activity when the facts warrant such an investigation, and a police officer is further authorized by Section 39-1-52.4 to make a limited protective search of the person suspected of criminal activity, but does not permit the police officer to demand that the suspect provide reliable information as to his identity, and offers the police officer no alternative if the request for identification is refused; and

WHEREAS crime of every description is on the increase within the City of Detroit, particularly street crimes committed by juveniles or "gangs" of young persons who consistently refuse to cooperate with the police in conducting their investigations; and

WHEREAS the Mayor of the City of Detroit has declared an emergency exists and an all out "war" against the juveniles responsible for this increase in crime, and the adults who encourage and cooperate with them;

NOW, THEREFORE, the City Council declares an emergency requiring the immediate enactment of this ordinance to insure the effective investigation by the Detroit Police Department of suspected criminal activity.

Section 1. That Chapter 39, Article 1 of the Code of the City of Detroit be amended by amending Section 39-1-52.3 as follows:

Section 39-1-52.3. When a police officer has reasonable cause to

The cause before this Court tests the constitutionality of that ordinance.

On September 14, 1976, at approximately 10:00 p.m., two Detroit police officers answered a radio run to investigate two people who appeared drunk in an alley (A. 4). The officers found respondent Gary DeFillippo and a young lady and both were asked for identification. The young lady produced numerous pieces of identification (A. 5, 9-10), but was arrested anyway for disorderly conduct because the officer detected a strong odor or alcohol (A. 5).

Respondent, when questioned, allegedly told the officer that he was Sergeant Mash, a Detroit police officer (A. 5), and then, when asked for further identification, the officer claims respondent corrected himself (A. 11) to say either that he knew Sergeant Mash (A. 8, 11) or that he worked

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believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity,the police officer may transport him to the nearest precinct in order to ascertain his identity.

Section 2. This emergency ordinance is declared necessary for the preservation of the public peace, health, safety and welfare of the people of the City of Detroit and is hereby given immediate effect.

(JCC P. 1680, August 18,1976)
Passed August 18, 1976.
Approved August 18, 1976.
Published August 19, 1976.
Effective August 19, 1976

JAMES H. BRADLEY,
City Clerk

for Sergeant Mash (A. 5). The officer admits that respondent did not appear to be drunk, (A. 8) but he was arrested for failure to produce identification (A. 5, 8, 10).

Mr. DeFillippo was then patted down, and the officer, through his "sensory perception" (A. 9) felt a bag of marijuana in respondent's right shirt pocket (A. 6, 9). A package of cigarettes was also taken from Mr. DeFillippo's left breast pocket (A. 6, 12), and the officer observed a tinfoil pack inside the cigarette package. The tinfoil package was further searched at the police station and found to contain 0.13 gram of phencycledine (A. 7).

Respondent, over timely objections (A. 12-14), was bound over for trial on a charge of possession of phencycledine, a felony with a maximum incarceration of four years MCLA 335.341(4)(b); MSA18.1070(4)(b). Respondent was not charged with or prosecuted for violation of the Stop and Identify Ordinance. A motion to suppress from evidence the tinfoil packet was brought prior to trial and was denied, and an interlocutory appeal was taken to the Michigan Court of Appeals. The Michigan court held that Detroit City Ordinance 39-1-52.3 was unconstitutional and since the ordinance was void, the search incident to the arrest for violation of the ordinance was unlawful. The evidence was ordered suppressed. On May 1, 1978, the Michigan Supreme Court denied petitioner's application for leave to appeal.

SUMMARY OF ARGUMENT

The Detroit City Code 39-1-52.3 allowed a police officer to stop a citizen upon suspicion and, having stopped him, to demand identification. The Michigan Court of Appeals

held this ordinance to be unconstitutional and held that searches conducted pursuant to it were unlawful.

This "Stop and Identify" ordinance contains two elements. First, the activity of a citizen must be suspicious in the mind of an officer and, second, a person who the officer believes suspicious must be unable to produce sufficient identification. The ordinance violates the Due Process Clause of the Fourteenth Amendment. A person cannot know when an officer will reasonably believe that the person's activities are suspicious and, therefore, a person cannot know when he must provide identification. Furthermore, the term "identification" is undefined and as such the average person cannot know what documentation he must carry to satisfy the ordinance.

The Detroit ordinance also violates the Fourth Amendment. Since the identification language of the ordinance does not provide a reasonable standard for arrest, a citizen may be arrested simply for suspicion rather than on probable cause.

If an officer is not satisfied with the information given to him, he may, in the guise of eliciting further information, compel a person to reveal facts which could implicate that person in a crime. This is violative of the Fifth Amendment.

The "good faith" of an officer in enforcing a statute which violates due process, undercuts the Fourth Amendment and violates the Fifth Amendment is immaterial. This Court has held in *Almeida-Sanchez v. United States*, 413 U.S. 266; 93 S. Ct. 2535; 37 L.Ed.2d 596 (1973), that a search incident to an arrest under the authority of an unconstitutional statute is an unlawful search.

Finally, no "good faith" test should apply to the facts of this case. The Detroit Common Council lacked good faith in passing an ordinance they knew to be ambiguous and in an

area preempted by state law. The arresting officer lacked good faith by stopping respondent on less than suspicious circumstances and arresting him in violation of other provisions of the City Code.

ARGUMENT

I.

THE DETROIT STOP AND IDENTIFY ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE RIGHT TO DUE PROCESS OF LAW, THE RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, AND THE PRIVILEGE AGAINST SELF-INCRIMINATION.

On August 18, 1976, the Detroit Common Council amended the City Code to allow a police officer to demand identification from a citizen whenever the officer "has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity."[8] This amendment was hastily adopted in response to the Mayor's declaration of an "all out war" against an upsurge of lawless juvenile gangs on the streets of the City of Detroit.[9]

The ordinance represents a statutory scheme allowing arrests and convictions of persons whose behavior could not be directly and constitutionally prohibited by vagrancy,

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[8]See footnote 7, *supra*, Statement of Facts.

[9]See footnotes 1-5, *supra*, Statement of Facts.

loitering, annoyance or suspicious persons penal ordinances.[10] While some police regulation of public places is a necessity in a complex and densely populated society, the vagueness and ambiguity of this "Stop and Identify" ordinance permits wholly indiscriminate police interference with the common public activity of ordinary citizens.

The ordinance invites unpredictable intrusions upon the citizen's privacy, freedom of movement,[11] freedom to

[10]*Coates v. Cincinnati*, 402 U.S. 611; 91 S. Ct. 1686; 29 L.Ed.2d 214 (1971) (an annoyance ordinance), *Palmer v. Euclid*, 402 U.S. 544; 91 S. Ct. 1563; 29 L.Ed.2d 98 (1971) (a suspicious person ordinance), *Papachristou v. City of Jacksonville*, 405 U.S. 156; 92 S. Ct. 839; 31 L.Ed.2d 110 (1972) (a vagrancy ordinance), *Shuttlesworth v. Birmingham*, 382 U.S. 87; S. Ct. 211; 15 L.Ed.2d 176 (1965) (a loitering ordinance.)

[11]The Michigan Court of Appeals held that:

> ...the ordinance seeks to make criminal, conduct which is innocent. *Papachristou v. City of Jacksonville, supra, Detroit v. Sanchez*, 18 Mich. App. 399, 401-402; 171 N.W.2d 452, 453 (1969).
>
> Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion — to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. *Pinkerton v. Verberg*, 78 Mich. 573, 584; 44 N.W. 579, 582-583 (1889). *People v. DeFillippo*, 80 Mich. App. 197, 202; 262 N.W.2d 921 (1977).

associate with others and his "right to be let alone — the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478; 48 S. Ct. 564; 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

A. The Ordinance Is Void For Vagueness.

A criminal statute which does not clearly define the conduct which it purports to punish, whose vague, ambiguous and fluid language sweeps unwary citizens under its prohibition without fair notice, violates the Fourteenth Amendment guarantee of due process of law. Where the statute inhibits behavior which is constitutionally protected as a fundamental right, the Due Process Clause requires a high degree of specificity in the statutory language employed.

The state may not impose criminal liability for conduct or speech which an average person could not reasonably understand to be forbidden. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453; 59 S. Ct. 618; 83 L.Ed. 888 (1939). When persons of common intelligence must guess at the meaning of a statute, that enactment violates the first essential of due process of law. *Connally v. General Construction Co.*, 269 U.S. 385, 391; 46 S. Ct. 126; 70 L.Ed. 322 (1926).

By its terms the Stop and Identify ordinance is violated only if the police officer stops the citizen for purposes of a *criminal investigation* and it subsequently appears that the citizen does not have the required "identification." When an officer stops a citizen for any other purpose, lack of

identification will not violate the ordinance even if the citizen refuses or is unable to give his "true identity" to the officer's satisfaction.

In almost all cases, a police officer arrests a person for the commission of a crime; however, the police stop citizens on the streets for numerous reasons other than the investigation of criminal activity. The Michigan Court of Appeals held that "an innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime." *People v. DeFillippo*, 80 Mich. App. 197, 201; 262 N.W.2d 921 (1978). The ordinance imposes no duty or requirement on the police to inform the citizen of the purpose of the intrusion and the requirement of identification. Without being informed by the officer of the purpose of the stop, the citizen of average intelligence, who has read the ordinance, would not have fair notice of the officer's subjective intent. When the citizen's innocent behavior is constitutionally protected, as in *Papachristou v. City of Jacksonville*, 405 U.S. 156; 92 S. Ct. 839, 31 L.Ed.2d 140 (1972), the lack of fair notice of *when* sufficient identification is required renders the ordinance at issue here in violation of due process of law.

The language of the ordinance which allows the officer to significantly intrude on the personal security of citizens is, itself, contradictory. According to the enactment, it shall be unlawful "to *refuse* to identify" oneself. However, in the next sentence, if the person is "*unable* to provide reasonable evidence of his true identity," the officer may transport the person to the nearest precinct. The act of *refusing* to identify oneself is vastly different from being *unable* to identify oneself. The citizen who is unable to

provide "verifiable documents" of identification, but volunteers his name, address and a reference, is hardly refusing to give the officer evidence of his "true identity." The language of the ordinance is therefore confusing to the average citizen.

The ordinance is vague, ambiguous and lacking in ascertainable standards to the extent that the identification requirement fails to give reasonable and fair notice of what constitutes an unlawful act. Compare *Palmer v. Euclid*, 402 U.S. 544; 91 S. Ct. 1563; 29 L.Ed.2d 98 (1971). People of common intelligence must necessarily guess as to what type of documentation they must have with them to walk the public streets. What type of document will satisfy the Stop and Identify ordinance? Does the document have to be issued by a particular agency, the city, state or federal government, to render it reasonable evidence of identification? May the document be issued by a private club, association or corporation? Must the document contain a recent and accurate picture of the person, his signature, his birthdate, address, social security or phone number to be considered "verifiable" under the ordinance? Is more than one document required?

If the ordinance only requires verifiable "oral" evidence of "true identity," what kind and how much information must a citizen volunteer to the officer to prove that his identity has been verified and is true? Does a person stand in a public place, free from arrest, based only on how many character references he may give to an officer to prove his identity? Must a citizen upon request tell a police officer where he lives, what he does for employment, who he knows or why he is on the public sidewalk in order to satisfy the police officer that he is who he says he is?

And what of the plight of the visitor from Onsted,

Michigan or Toledo, Ohio? Will they be able to verify their names or addresses or whatever pieces of identification they may produce? Under any application of the Detroit ordinance tourists, visitors or conventioneers would be well advised to remain in the safety of their hometowns rather than to risk the refusal by a Detroit police officer of a driver's license issued by the state of Utah.

This Court held in *Hynes v. Mayor of Oradell*, 425 U.S. 610; 96 S. Ct. 1755; 48 L.Ed.2d 243 (1976) that an ordinance which regulated the First Amendment area of canvassing and soliciting violated the Due Process Clause because of vagueness. The ordinance in that case was a crime prevention provision[12] which required a person or organization, who desired to canvass or solicit from house to house, to first notify the police department in writing for *identification* only. This ordinance was constitutionally infirm because the provision did not "sufficiently specify what those within its reach must do in order to comply" with its identification requirement. 425 U.S. at 621. This Court held that the ordinance " 'may trap the innocent by not providing fair warning.' *Grayned v. City of Rockford*, 408 U.S. 104, 108; 33 L.Ed.2d 222, 92 S. Ct. 2294 (1972)." 425 U.S. at 622.

The ordinance at issue here lacks the same degree of specificity as did the ordinance in *Hynes* because the word "identification" is used without indicating what form of identification satisfies the ordinance.

The absence of enunciated guidelines also permits and encourages harsh and discriminatory enforcement by local authorities against the members of unpopular or controversial groups. See *Papachristou, supra* at 170. If there was suspicion of criminal activity in the vicinity of a pro-Nazi rally in Skokie, Illinois, a lobbying effort by the National Organization for Reform of Marijuana Laws in Washington, D.C., or a gay-rights protest in Miami, Florida, could local enforcement officials demand identification documents from all participants? The terms of the Detroit ordinance would appear to answer this query affirmatively.[13]

[12]See discussion at 425 U.S. at 617-620. The ordinance in *Hynes, supra* at 611 n.1, made it a misdemeanor to violate its provisions.

This Court constitutionally criticized the loitering ordinance in *Shuttlesworth v. Birmingham*, 382 U.S. 87; 86 S. Ct. 211; 15 L.Ed.2d 176 (1965), because it did " 'not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.' " The Stop and Identify ordinance suffers from the same unconstitutional vice.

"The vice of constitutional vagueness is further aggravated where... the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287; 82 S. Ct. 275; 7 L.Ed.2d 285 (1961). The Detroit ordinance allows arrest and conviction of a citizen who refuses to identify himself and who in a nonprovocative manner voices his objection because he feels the detention is highly questionable. The First Amendment right to freedom of speech protects the speech of the protesting arrestee when the words spoken are the

[13]This Court held in *Marcus v. Property Search Warrant*, 367 U.S. 717, 729; 81 S. Ct. 1708; 6 L.Ed.2d 1127 (1961) that:

> The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.

basis of the arrest and conviction. *Norwell v. Cincinnati*, 414 U.S. 14; 94 S. Ct.187; 38 L.Ed.2d 170 (1973). Because the ordinance infringes upon the First Amendment by punishing and inhibiting a citizen's right to unabusively protest his arrest, it is unconstitutional.

B. The Ordinance Undercuts The Fourth Amendment Requirement Of Searches Only Upon Probable Cause.

The only legislative purpose clearly suggested by the Detroit Common Council was that the ordinance was needed "to insure the effective investigation by the Detroit Police Department of suspected criminal activity."[14] The ordinance contains a purportedly *Terry*-type standard for the stop of a citizen. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct.186; 20 L.Ed.2d 889 (1968). Pursuant to authority granted the police officer, he may arrest a citizen who does not have the required identification. Incident to that arrest, the officer may then conduct a full-blown custodial search of the citizen. *Gustafson v. Florida*, 414 U.S. 260; 94 S. Ct. 488; 38 L.Ed.2d 456 (1973), *United States v. Robinson*, 414 U.S. 218; 94 S. Ct. 467; 38 L.Ed.2d 427 (1973).

The Fourth Amendment allows a warrantless arrest only where the officer has probable cause to believe that the arrestee has committed a crime; "Under our system, suspicion is not enough for an officer to lay hands on (arrest) a citizen." *Henry v. United States*, 361 U.S. 98, 104; 80 S. Ct. 168; 4 L.Ed.2d 134 (1959). The proper test for probable cause is:

[14]See footnote 7, *supra*.

> ...whether at the moment the facts and circumstances within their (the officers') knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the...(arrestee)...had committed or was committing an offense. *Brinegar v. United States*, 388 U.S. 160, 175-176, 93 L.Ed. 1879, 1890, 60 S. Ct. 1302 (1949) ... '*To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprise...* '*Beck v. Ohio*, 379 U.S. 89, 91; 85 S. Ct. 223; 13 L.Ed.2d 142 (1964) (emphasis added).

The ordinance under which the respondent was arrested does not meet the probable cause standard of the Fourth Amendment. The enactment attempts to authorize arrests which, in the absence of that ordinance, could not be effected at all. This Court held in *Sibron v. New York*, 392 U.S. 40, 61, 62; 88 S. Ct. 1889; 20 L.Ed.2d 917 (1968) that a State is:

> ...free to develop its own law of search and seizure to meet the needs of local law enforcement...in the process it may call the standards it employs by any names it may choose. *It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct...(The) emphasis (is) not so much the language employed as the conduct it authorizes.* (Emphasis added).

The Detroit Common Council labeled it a crime for a citizen not to have requisite identification during an officer's investigation of that person for criminal activity. By making such conduct criminal, the Common Council enacted an ordinance which allows an arrest to be effected on the basis of a factual situation short of the probable cause standard which makes an arrest reasonable under the Fourth Amendment.

In reference to an unconstitutional vagrancy ordinance, the Ninth Circuit held in *Powell v. Stone*, 507 F.2d 93, 96 (CA 9, 1974) rev'd on other grounds, 427 U.S. 465; 96 S. Ct. 3037; 49 L.Ed.2d 1067 (1976), that:

> ...A legislature could not reduce the standard for arrest from probable cause to suspicion; *and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense.* (Emphasis added).

The Detroit ordinance indirectly reduces the proper standard of probable cause for arrest to a *Terry*-type standard by making the absence of identification during a criminal investigation a substantive offense. If a person is properly stopped pursuant to *Terry v. Ohio, supra*, the failure to identify oneself adequately to the police officer is just another factor among the suspicious circumstances being investigated. The citizen's failure to answer the officer's questions during the investigation "furnishes no basis for an arrest." *Terry v. Ohio, supra* at 34 (White, J., concurring). This Court has held that:

> Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality... A direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster. *Papachristou v. City of Jacksonville, supra* at 170.[15]

[15]In a separate opinion in *Palmer v. Euclid*, 402 U.S. 544; 91 S. Ct. 1563; 29 L.Ed.2d 98 (1971). Mr. Justice Stewart held that while a policeman has a duty to investigate suspicious circumstances, the State does not have the constitutional power to make suspicious circumstances a criminal offense. 402 U.S. at 546.

In *Papachristou*, this Court reversed the conviction of Jimmy Lee Smith who with his companion was arrested on a public street. Based on a complaint by store owners, the police stopped Mr. Smith and his companion because of their suspicious activity. Mr. Smith was arrested because he did not have an identification and the officers did not believe his story.

Suspicious circumstances which may justify a stop and investigation do not support an arrest unless they raise to the level of probable cause within the Fourth Amendment.

The central purpose of the Fourth Amendment is to protect the privacy and personal security of persons against arbitrary intrusion by the police. *United States v. Ortiz*, 422 U.S. 391, 895; 95 S. Ct. 2585; 45 L.Ed.2d 623 (1975), *Camara v. Municipal Court*, 387 U.S. 523, 528; 87 S. Ct. 1727; 18 L.Ed.2d 930 (1967), *Wolfe v. Colorado*, 338 U.S. 25, 27; 69 S. Ct. 1359; 93 L.Ed.2d 1782 (1949). A reasonable arrest must always be based on probable cause to believe a crime is being or is about to be committed. *Beck v. Ohio, supra* at 91. When a police officer has no standards governing his discretion as to whether a statute has been violated, the officer is permitted and encouraged to arbitrarily enforce the law and arrest persons. *Papachristou, supra* at 170. Pursuant to an unconstitutionally vague ordinance, a policeman cannot gauge justification for a reasonable arrest because in such an instance a prudent person cannot form a reasonable basis on which to believe the ordinance is violated. *Powell v. Stone*, 507 F.2d 93, 96 (CA 9, 1974), *Hall v. United States*, 459 F.2d 831, 837 (CA DC, 1972). The Stop and Identify ordinance fails to provide the police with any ascertainable guidelines by which they may determine if a citizen has violated its prohibition. (See Argument I A). The ordinance violates the Fourth Amendment requirement of probable cause because it does not provide sufficiently clear statutory language for an officer to base an articulable reasonable belief that a crime is being committed.

C. The Ordinance Violates The Fifth Amendment Prohibition Against Compulsory Self-Incrimination.

No citizen may be criminally punished for failure to comply with a statutory disclosure requirement if it confronts him with "substantial hazards of self-incrimination." *Haynes v. United States*, 390 U.S. 85; 88 S. Ct. 722; 19 L.Ed.2d 923 (1968), *Grosso v. United States*, 390 U.S. 62; 88 S. Ct. 709; 19 L.Ed.2d 906 (1968), *Albertson v. S.A.C.B.*, 382 U.S. 70; 86 S. Ct. 194; 15 L.Ed.2d 165 (1965). The Stop and Identify ordinance infringes on the fundamental privilege against self-incrimination because it confronts an arrestee with "substantial hazards of self-incrimination" and not a "mere possibility of incrimination."

A person stopped for investigation is required to "produce verifiable documents or other evidence of such identification." This language gives unbridled discretion to the officer to decide if the person has proved his "true identity." (See Argument I A, supra). Under the guise of enforcement more than "mere identity" may be drawn from the unwary citizen; name and address may not be enough for the persistent police officer. Since it is unclear what information must satisfy the ordinance, the unlimited authority given to the police to threaten citizens with arrest is pregnant with abusive power to gain an incriminating statement.

This Court's holding in *California v. Byers*, 402 U.S. 424; 91 S. Ct. 1535, 29 L.Ed.2d 9 (1971), which distinguished the Albertson line of cases, is inapplicable to the instant case. The clear purpose of the Detroit ordinance was to give the police department an investigative tool to

ferret out crimes committed by "uncooperative" juvenile gangs.[16] Thus the ordinance was directed at a highly selective group or a group inherently suspect of criminal activities. The ordinance requiring disclosure operates in an area permeated with criminal statutes. It serves as essentially criminal and nonregulatory area of inquiry.

At the same time this ordinance was passed, the Detroit Juvenile Curfew Ordinance was enacted. Detroit City Code 36-3-1 and 36-3-2.[17] The Stop and Identify ordinance was passed to aid the enforcement of the curfew laws. Any "verifiable identification" produced on demand by a citizen will probably contain a statement of age or date of birth. Such identification could establish conclusive proof of a violation of the curfew laws. Therefore, the purpose of the ordinance was to facilitate stops, arrests and convictions of members of juvenile gangs.

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[16]See footnote 7, *supra*.

[17]DETROIT CITY CODE.

Sec. 36-3-1. Public Streets, playgrounds, etc.

It shall be unlawful for a minor to be on the public streets, playgrounds, vacant lots or other unsupervised place, if such minor is under eighteen years of age, between the hours of 10:00 P.M. and 6:00 A.M. except Fridays and Saturdays, when the time for minors sixteen and seventeen years of age shall be between 11:00 P.M. and 6:00 A.M.

DETROIT CITY CODE

Sec. 36-3-2. Theatres, bowling alleys and other places of amusement.

It shall be unlawful for a minor to be in a theatre, moving picture show, bowling room or other place of amusement:

(a) If such minor is under twelve years of age, between the hours of 7:00 P.M. and 6:00 A.M.

(b) If such minor is twelve years of age and under eighteen years of age, between the hours of 9:30 P.M. and 6:00 A.M., except Fridays and Saturdays, when the time for minors sixteen and seventeen years of age shall be between 10:30 P.M. and 6:00 A.M.

It was noted in *Davis v. Mississippi*, 394 U.S. 721; 39 S. Ct. 1394; 22 L.Ed.2d 676 (1969) that it is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have *no right to compel them to answer.*" 394 U.S. at 727 fn. 6, (Emphasis added.) See also *People v. Berck*, 32 N.Y.2d 567, 574; 300 N.E.2d 411 (1973), *cert. denied sub nom.*, 414 U.S. 1093; 94 S. Ct. 724; 38 L.Ed.2d 550 (1973).

As Mr. Justice White wrote in his concurring opinion to *Terry v. Ohio, supra* at 34, while an officer can stop and question a person on the street:

> The person stopped is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest. 392 U.S. at 34.

Since the Detroit ordinance attempts to circumvent the Fifth Amendment by requiring answers to questions, which answers may form the basis of a criminal prosecution, the ordinance is unconstitutional.

II.

EVIDENCE SEIZED THROUGH AN ARREST AND SEARCH PURSUANT TO AN ORDINANCE SUBSEQUENTLY DECLARED UNCONSTITUTIONAL AS VOID FOR VAGUENESS AND CONTRARY TO THE FOURTH AMENDMENT, IS INADMISSIBLE REGARDLESS OF THE OFFICIAL'S GOOD FAITH.

A warrantless search is "*per se* unreasonable under the Fourth Amendment — subject only to a few specifically

established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455; 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971). Certainly one such exception is a search and seizure made incident to an arrest. However, when the arrest exception is relied upon "the constitutional validity of the search...must depend upon the constitutional validity of the...arrest." *Beck v. Ohio*, 379 U.S. 89, 91; 85 S. Ct. 223; 13 L.Ed.2d 142 (1964). Therefore, if the arrest in this case offends the Constitution because it is based upon a void statute, the search is equally offensive to the Constitution.

No "good faith exception" has been recognized to cure this infirmity. "*All evidence* obtained by searches and seizures in violation of the Constitution is...inadmissible in a state court." *Mapp v. Ohio*, 367 U.S. 643, 655; 81 S. Ct. 684; 6 L.Ed.2d 1081 (1961) (emphasis added).

A. Reliance On An Ordinance Which Violates The Fourth Amendment Does Not Make An Otherwise Illegal Search Constitutional.

The State of Michigan concedes that "where the purpose of a statute is to authorize seizures and/or searches and not to define and regulate conduct criminally, and that authorization is in conflict with the Fourth Amendment, then a seizure or search pursuant to the statute is unreasonable and a violation of the Fourth Amendment, despite the fact that the police acted pursuant to its authorization in good faith." (P.B. 13). Although it is arguable that this concession is dispositive of the instant case, the State apparently maintains that the purpose of the Detroit ordinance is not to authorize searches and that case

law recognizes a distinction between those statutes which regulate conduct criminally and those which allow searches. Respondent DeFillippo contends that the State is wrong on both grounds.

Initially, the Stop and Identify ordinance unquestionally authorizes the search and seizure of an individual *as well as* defining a substantive offense. The ordinance defines the reason for which a person may be seized, authorizes "further investigation" and detention, and ultimately allows an arrest for a newly created offense which necessarily includes an incidental search. Moreover, even if Petitioner were correct, the distinction becomes meaningless with the realization that the search of Mr. DeFillippo was based entirely on the alleged violation of the ordinance. What difference is presented when a search is conducted because an ordinance directly authorizes it, and when an arrest is made pursuant to an ordinance and the search is incident thereto? The same result is achieved through *indirect* means. Finally, although the ordinance defines a substantive offense (failure to produce identification), its practical use as a pretext renders it essentially a procedural ordinance. As Chief Judge Bazelon succinctly said, concurring in *Hall v. United States,* 459 F.2d 831 (CA DC, 1972):

> ...if the statute, though purporting to define a substantive offense, were designed to "authorize police conduct which trenches upon Fourth Amendment rights", *Sibron v. New York*, 390 U.S. 40, 61 (1968), or if in practice it had not other legitimate effect, the statute itself would then violate the Fourth Amendment, and the good faith or reasonable belief of the police would be irrelevant to the constitutionality of arrests or searches made under it. *A good faith arrest for a "sham offense" stands on the same constitutional plane as a "sham arrest" under a valid statute.* 459 F.2d at 842 (emphasis added).

The decision of this Court in *Almeida-Sanchez v. United States*, 413 U.S. 266; 93 S. Ct. 2535; 37 L.Ed.2d 596 (1973), is a direct counterpoint to the State's position. That case struck down a federal statute which allowed warrantless searches without probable cause of vehicles within a reasonable distance of any external boundary of the United States. Noting that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution", 413 U.S. at 272, the Court struck down the statute and affirmed the principle that:

> ...those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. 413 U.S. at 274-275.

Nowhere in the majority opinion does the Court in *Almeida-Sanchez* suggest that there is a difference between procedural and penal statutes with respect to violations of the Fourth Amendment.[18] *Almeida-Sanchez* is, therefore, not distinguishable on that ground from the case at bar.

Petitioner implies that *Almeida-Sanchez* stands alone as precedent for invalidating a search authorized by a statute later held unconstitutional. This is not so.

In *Coolidge v. New Hampshire*, 403 U.S. 443; 91 S. Ct. 2022; 29 L.Ed.2d 564 (1971), evidence obtained in an automobile search by police pursuant to a warrant issued by the attorney general of the state was suppressed because the

[18] In Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* it is even suggested that the Government had argued that penal statutes *are* subject to Fourth Amendment restrictions while procedural statutes *are not.* 413 U.S. at 278-279 (Powell, J., concurring).

warrant was not issued by a "neutral and detached magistrate" as required by the Fourth Amendment, even though a state statute authorized the issuance of the warrant.

In *Berger v. New York*, 388 U.S. 41; 87 S. Ct. 1873; 18 L.Ed.2d 1040 (1967), evidence was obtained through electronic eavesdropping under the authority of a New York statute. This Court ruled that the evidence must be excluded because the statute failed to meet Fourth Amendment requirements.

In *United States v. Brignoni-Ponce*, 422 U.S. 873; 95 S. Ct. 2574; 45 L.Ed.2d 607 (1975), the Government relied upon "statutory authority" to support stopping cars in border areas without warrants. This Court again rejected the argument that arrests without probable cause made in reliance on a statute renders them constitutionally permissible.

> "No Act of Congress can authorize a violation of the Constitution", *Almeida-Sanchez, supra* at 272, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas. 422 U.S. at 877-878.

The exclusionary rule was then invoked and testimony of and about two alien passengers found in the car was suppressed.

In *Sibron v. New York*, 390 U.S. 40; 88 S. Ct. 1889; 20 L.Ed.2d 917 (1968), although this Court did not decide upon the validity of the statute under which the police had acted, evidence obtained in a search conducted in accordance with a state "Stop and Frisk" statute was suppressed on Fourth Amendment grounds:

> The question in this Court upon review of a state-approved search or seizure is not whether the search

> (or seizure) was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. 390 U.S. at 60-61.

In *Hall v. United States*, 459 F.2d 831 (CA DC 1971), the court of appeals excluded evidence in a narcotics prosecution seized incident to a good faith arrest under a vagrancy statute held unconstitutional for undercutting the probable cause requirement. The majroity opinion reasoned that "neither Congress in fashioning a statute, nor a law enforcement officer in executing a statute, is free to compromise or ignore the Fourth Amendment." 459 F.2d at 835. The court determined that a constitutional violation had occurred and excluded the evidence.

The Second and Ninth Circuit Courts of Appeals have also applied the exclusionary rule to suppress evidence seized incident to good faith arrests under vagrancy statutes later declared unconstitutional. In *Newsome v. Malcolm*, 492 F.2d 1166 (CA 2, 1974), evidence seized pursuant to such an ordinance was suppressed because the arrest was not supported by probable cause.[19] Since the vagrancy ordinance lacked essential probable cause safeguards, a searched incident to such an arrest was also unsupported by probable cause and therefore invalid. Likewise, the Mich-

[19]See also *People v. Peterkin*, 48 AD 2d 843; 368 N.Y.S.2d 290 (1975), where defendant was arrested under a New York loitering statute because he was unable to produce identification. A search incident to the arrest produced evidence used in an armed robbery trial against defendant. The supreme court, appellate division, reversed Peterkin's conviction, noting that "suspicion is not probable cause for arrest" and "the warrantless search, which was made as an incident of an arrest under New York's loitering statute, was illegal since that statute plainly undercuts the requirement that arrests are lawful only upon a showing of probable cause." 368 N.Y.S.2d at 292.

igan Court of Appeals recognized that the Detroit ordinance undercuts the probable cause standard of the Fourth Amendment by, in effect, authorizing full searches on suspicion. In *Powell v. Stone*, 507 F.2d 93 (CA 9, 1974), rev'd on other grounds, 428 U.S. 465; 96 S. Ct. 3037; 49 L.Ed 2d 1057 (1976), the defendant was arrested under a vagrancy ordinance which led to the discovery of a murder weapon in a search incident to the arrest. The ordinance was declared unconstitutional as void for vagueness and because it subverted the Fourth Amendment probable cause standard by making suspicious conduct a substantive offense. The court suppressed the murder weapon regardless of the officer's good faith reliance on the ordinance.

Good faith reliance simply makes no difference when the Fourth Amendment is violated. This Court has not recognized an exception to the exclusionary rule where officers rely in good faith upon a decision of a state supreme court. In *Mincey v. Arizona*, ____ U.S. ____ , 98 S. Ct. ____ ; 57 L.Ed.2d 290 (1978), police officers conducted an extensive warrantless search of Mincey's apartment subsequent to a fatal shooting therein. The officers' actions was specifically sanctioned by a "murder scene exception" set forth in a previous decision of the Arizona Supreme Court. This Court struck down the state-created exception to the warrant requirement stating that the guidelines of that exception would:

> ...confer unbridled discretion upon the individual officer to interpret such terms as "reasonable period." It is precisely this kind of judgmental assessment of the reasonableness and scope of a proposed search that the Fourth Amendment requires be made by a neutral and objective magistrate, not a police officer. 57 L.Ed.2d at 301-302.

The matter was then remanded to determine whether the evidence was seized under established Fourth Amendment standards independent of the judicially created exception. Thus, this Court has steadfastly maintained that police conduct must conform to the Fourth Amendment regardless of good faith reliance upon statute, ordinance or court decision.

Michigan courts have even recognized that reliance on our state's constitution is misplaced when that constitution is in conflict with the Fourth Amendment of the United States Constitution. In *People v. Pennington*, 383 Mich. 611; 178 N.W.2d 471 (1970), the Michigan Supreme Court invalidated Article I, §11 of the Michigan Constitution of 1963, which made the exclusionary rule inapplicable with respect to drugs and dangerous weapons unlawfully seized outside the curtilage of a dwelling house. Therefore, without regard to the officer's reliance on the presumably valid state constitution, a gun seized by the officer from defendant's car without a warrant or probable cause was excluded from evidence.

In summary, states cannot disregard or dilute the Fourth Amendment when enacting laws. When police act pursuant to an ordinance that undercuts the probable cause standard of the Fourth Amendment by sanctioning full searches based on mere suspicion and that ordinance does not provide reasonable standards for determining whether the substantive offense has been committed, then the arrest and incidental search is not constitutionally valid merely because the police relied in good faith upon that ordinance. The Detroit ordinance violates the Fourth Amendment and the decision of the Michigan Court of Appeals should be affirmed.

B. Good Faith Cannot Legitimize An Unconstitutional Ordinance.

This Court has consistently supported the rule that "good faith on the part of the arresting officer is not enough" to justify an arrest or search or dictate the admission of the evidence seized. *Henry v. United States*, 361 U.S. 98, 102; 80 S. Ct. 168; 4 L.Ed.2d 134 (1959), *Beck v. Ohio*, 379 U.S. 89, 97; 88 S. Ct. 223; 13 L.Ed.2d 142 (1964), *Hill v. California*, 401 U.S. 797, 804; 91 S. Ct. 1106; 28 L.Ed.2d 484 (1971). The rejection of a good faith doctrine in *Beck* is clear:

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. 379 U.S. at 97.

Initially, the question of what constitutes a good faith arises. If mere reliance on an ordinance is sufficient, is an officer free to ignore the Constitution merely because a local ordinance says so? To adopt a good faith standard would require each court to subjectively probe the mind of the officer and speculate whether the police had actual or constructive knowledge of the unconstitutionality of the enactment. This would require the exact case-by-case analysis of the exclusionary rule already rejected by this Court.[20]

Petitioner cites *United States v. Kilgen*, 445 F.2d 287 (CA 5, 1971), for the proposition that the unconstitutionality of a statute does not automatically render an arrest and

[20]See *United States v. Peltier*, 422 U.S. 531, 560; 95 S. Ct. 2113; 45 L.Ed.2d 374 (1975) (Brennan, J., dissenting).

search illegal absent a showing that police lacked a good faith belief in the validity of the statute. In *Kilgen*, however, the defendants had consented to the search in question and furthermore the ruling was based on Kilgen's lack of standing to attack the admissibility of the evidence. 445 F.2d at 289. However, to the extent that dicta in that case supports petitioner's view, it must be noted that the reasoning in *Kilgen* relied upon *Pierson v. Ray*, 380 U.S. 547; 87 S. Ct. 1213; 18 L.Ed.2d 288 (1967). *Pierson* concerned a *civil* action for damages under the Civil Rights Act of 1871 against an officer who arrested the plaintiff under an invalid statute. There was no search involved in *Pierson*, but, even more importantly, while a rule immunizing the police from civil liability if they act in good faith would be appropriate in a tort action for the intentional violation of a defendant's rights, it has no place where Fourth Amendment rights are concerned. "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law." *Silverman v. United States*, 365 U.S. 505, 511; 81 S. Ct. 679; 5 L.Ed.2d 734 (1961).

Good faith cannot be a substitute for Fourth Amendment rights. Moreover, there can be no good faith reliance on an ordinance that violates the Fourth Amendment itself. To hold otherwise would condone police action that flagrantly violates the Fourth Amendment simply because the conduct was authorized by a legislative enactment. The ordinance would then become a replacement for the Fourth Amendment. Since this result should not be tolerated, the Michigan Court of Appeals should be affirmed.

C. The Exclusionary Rule Requires Suppression Of This Evidence.

The trend, according to Petitioner (P.B. 15), is to suggest that the primary or sole purpose of the exclusionary rule is to deter unlawful police action and that when an arresting officer has no reason to believe that his conduct is unlawful, then the exclusionary rule is inapplicable because it serves no purpose. Respondent agrees that courts should not attempt to require police officers to be "legal technicians", responsible for making *ad hoc* legal judgments on the constitutionality of an ordinance. However, every police officer presumably knows the principles of the Fourth Amendment and is duty bound to uphold them. Therefore, when an ordinance allows searches on suspicion, officers will have reason to believe that their conduct in unlawful, not based on an ability to be a legal technician but rather based on the Constitution they enforce.

Moreover, the deterrent function is not aimed solely at the individual officers involved and does not depend on the knowledge of those officers. The deterrent function serves a much broader purpose:

> The exclusionary rule is aimed at affecting the wider audience of all enforcement officials, and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them. *United States v. Peltier*, 422 U.S. 531, 557; 95 S. Ct. 2313; 45 L.Ed.2d 374 (1975) (Brennan, J., dissenting).

The general, rather than the specific deterrent effect was recognized in *Elkins v. United States*, 364 U.S. 206; 80 S. Ct. 1437; 4 L.Ed.2d 1669 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it. 364 U.S. at 217.

This type of vague ordinance has historically been used as a pretext in hopes of discovering evidence of a more serious crime. Like many vagrancy statutes, the Detroit ordinance is sufficiently imprecise to allow a pretext arrest "which is perhaps not surprising in light of the evidence that many vagrancy statutes and ordinances have been enacted for the express purpose of providing the police with power to arrest suspicious persons." Kamisar, LaFave, Israel, *Modern Criminal Procedure*, p. 291 (1974). The significance of this use of the Detroit ordinance is that should this Court refuse to apply the exclusionary rule, the police may continue to use this or similar ordinances as subterfuges and, by not charging the individual with substantive provisions, no constitutional attack against the ordinance can be mounted. The police would then have the continued use of the ordinance to subvert the Fourth Amendment and the ordinance would remain forever unreviewable. It should be noted here that although Gary DeFillippo was originally arrested for violation of The Stop and Identify ordinance, he was never prosecuted for that violation.

If, as this Court has clearly announced, legislatures are not free to pass laws that violate the Constitution, the appropriate remedy of exclusion and its deterrent effect should apply equally to them.

Although the deterrent effect of the exclusionary rule is of prime importance, it does not represent, either historically or factually, the only supporting function to the rule. Application of the exclusionary rule serves another vital function — "the imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222; 80 S. Ct. 1437; 4 L.Ed.2d 1669 (1960). The judicial integrity of the courts is protected by ensuring that they "will not be made party to

lawless invasions of the constitutional rights of citizens by permitting unhindered use of the fruits of such invasions." *Terry v. Ohio*, 392 U.S. 1, 12-13; 88 S. Ct. 1868; 20 L.Ed.2d 889 (1968). Contrary to Petitioner's assertion (P.B. 19) the judicial integrity of the courts is not infringed only when there is a willful violation of the Constitution because the focus is on whether the courts will turn a deaf ear to constitutional violations rather than on the conduct of the police. Judicial integrity is preserved when a court does not sanction invasions of citizens' constitutional rights merely because an officer relied on an unconstitutional ordinance.

Finally, the intrusion upon Fourth Amendment rights cannot be considered minimal in comparison with the need for law enforcement practices that the ordinance attempts to promote.

> The need of law enforcement stands in constant tension with constitutional protections of the individual against certain exercise of official power. It is precisely the predictability of these pressures that compels a resolute loyalty to constitutional safeguards. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272; 93 S. Ct. 2435; 37 L.Ed.2d 596 (1973).

Underlying policies of deterrence and judicial integrity require that the exclusionary rule be applied. Ultimately, if this Court concludes that the policies supporting the exclusionary rule do not demand the suppression of the evidence, the question becomes why a balancing of the policies through a "pragmatic analysis" should be determinative of paramount individual claims to enforcement of constitutional guaranties. Constitutional rights must be respected even if there is a conflict of supporting policies. The Fourth Amendment cannot be ignored simply because it does not advance certain judicial or societal goals. The Michigan Court of Appeals properly envoked the exclusionary rule and their decision should be affirmed.

III.

THE ACTIONS OF DETROIT OFFICIALS IN ENACTING AND ENFORCING THE "STOP AND IDENTIFY" ORDINANCE WERE NOT PURSUED IN COMPLETE GOOD FAITH.

A. The Detroit Common Council Lacked Good Faith.

If this Court should decide that an exception to the exclusionary rule exists allowing evidence seized pursuant to an unlawful arrest when the official action was pursued in good faith, a detailed examination should follow testing whether the officials in the instant case qualify under the exception. It is clear that mere reliance on the presumptive validity of the ordinance by police officers is insufficient because if it were not so, this Court would sanction legislative enactment of sham offenses and pretext arrests under those ordinances.

Therefore our scrutiny here should begin with the motivations of the Detroit Common Council in promulgating §39-1-52.3[21] As was previously noted,[22] the Council

[21]Respondent agrees with the Ninth Circuit Court of Appeals that "the public interest is served by deterring legislators from enacting such statutes (which allow arrest on less than probable cause)." *Powell v. Stone*, 507 F.2d 93, 98 (CA 9, 1974), *rev'd on other grounds*, 428 U.S. 465; 96 S. Ct. 3037; 49 L.Ed.2d 1067 (1976).

Additionally, it is interesting to note that when petitioner seeks to justify the right of a legislative body to pass such a law, the justification is based on the "police power" of the legislature. Petitioner's Brief P. 22. It is, therefore, straining the rationale of the exclusionary rule to maintain that it applies only to police officers and not to legislators.

[22]See footnotes 4 and 5, *supra*.

in a crisis session met on August 18, 1976, hoping to remedy the problem of juvenile gang violence in Detroit. Pursuant to that desire a strict curfew[23] and the Stop and Identify Ordinance were passed and given immediate effect.[24]

The Detroit legislative body, however, had good cause to believe that the ordinance was doomed by its facial ambiguity. During the August 18th session, two proponents of the ordinance spoke before the Common Council, Police Chief Phillip Tannian and Assistant Corporation Council Maureen Reilly. Chief Tannian told the councilpersons that the ordinance would require written identification including name, address and "anything sufficient to identify the person in question."[25] At this same session, Ms. Reilly informed the Council that the identification could be oral.[26]

[23]See footnote 6, *supra*.

[24]Journal of the City Council, August 18, 1976, P. 1680.

[25]The actual exchange is as follows:

Levin (Council President) — Asked if the ordinance will require specific identification.
Tannian — Stated that it will require written identification on the part of everyone; including the persons' name, address and anything sufficient to identify the individual in question.

Notes of the Special Session of August 18, 1976.
Unofficial record, Page 1.

[26]The actual exchange is as follows:

Councilman Levin — Referred to Section 39-1-52.3 and asked if identification of a person can be oral.
Ms. Reilly (Asst. Corp. Counsel) — Said yes, if the officer believes the person.
Levin — Asked if it is accurate to say that as written, the proposed ordinance could or might be satisfied with oral identification.
Ms. Reilly — Said yes.
Levin — Asked that the word "reasonable" be inserted before the words evidence of his true identity, in Section 39-1-52.3 of the proposed ordinance. He later asked if it is a fair statement to say that under the ordinance written identification is not required, nor is it conclusive.
Ms. Reilly — Said yes.

Notes of the Special Session of August 18, 1976. Unofficial record, Page 3.

Under these circumstances alone it is difficult to imagine how the council could have known for certain the meaning of the crucial phrase "refuse to identify himself, and to produce verifiable documents or other evidence of such identification." If the council persons were unsure of the interpretation, how could they expect police officers or the respondent to be more certain of how to conform their conduct to law.

Furthermore, the Council in passing the Stop and Identify ordinance knew or should have known that the ordinance was illegal under Michigan state law.

The power to declare a state of emergency and, based upon that situation, to invoke a curfew or restrict the right to travel or assembly is exclusively vested in the office of the Governor of the State of Michigan. MCLA §10.31-10.33. That statute had been recently tested in the Michigan Supreme Court and the ruling from that court was clear and concise. *Walsh v. City of River Rouge*, 385 Mich. 623, 189 N.W.2d 318 (1971).[27] Neither a local mayor nor a local city government can effectuate a state of emergency in response to rioting. Neither may promulgate rules or regulations to bring the emergency under control; neither may establish a curfew nor control assembly on public streets. MCLA §10.31; Walsh, supra at 639-640.

Citizens cannot successfully claim ignorance of the law as an excuse. How then may the Detroit City Council absolve itself from disregarding state law and the pronouncement of the highest court of the state?

[27]In *Walsh* the court pointed out that not only was the language of the state statute clear, but on two occasions the state legislature attempted to amend the law to give cities emergency powers — both attempts were vigorously vetoed by Governors George Romney and William Milliken. *Walsh v. City of River Rouge*, 385 Mich. 623, 630-634; 189 N.W.2d 318 (1971).

B. The Arresting Officer Lacked Good Faith.

Without regard to the intentions of the drafters of the Stop and Identify legislation, the actions of the arresting officer demonstrate a lack of the "good faith" necessary to qualify this case within the parameters of the exception to the exclusionary rule suggested by petitioner herein.

The Detroit Stop and Identify ordinance requires that before an officer may demand that a citizen produce identification the police officer must have "reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity." Detroit City Code 39-1-52.3. Yet Mr. DeFillippo at the time Officer Bednark demanded identification had violated no law in the officer's presence nor had he done anything to arouse reasonable suspicion of a criminal violation.

The officer's initial radio run was to investigate two drunks in an alley (A. 4). DeFillippo was in the alley but did not appear to be intoxicated by any criteria indicated by the officer (A. 8). A young lady in the same alley was apparently intoxicated (A. 5) and was in the process of removing her pants to urinate (A. 4-5). If the young lady was engaged in a violation of the law amounting to disorderly conduct, how do her actions reflect upon respondent who was, for all appearances, a mere bystander? It has long been the law in the State of Michigan that:

> Mere presence, even with knowledge that an offense is about to be committed, or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval sufficient, nor passive acquiesence or consent. *People v. Burrel*, 253 Mich. 311, 323; 235 N.W. 170 (1931).

Therefore, respondent had committed no act which under the specific terms of the ordinance would have given the officer the right to demand identification. How then was Officer Bednark acting in good faith? Perhaps, it will be argued, the officer might have suspected that the lady's partially disrobed appearance coupled with respondent's presence in the alley suggested the possibility of an attempted forcible sex offense. This argument will also not fit the facts since the lady explained her condition to the officers in a manner to exclude Mr. DeFillippo from culpability (A. 5) and she proceeded to shower affection upon respondent (A. 5).

Further, the Detroit City Code 39-1-52.3 provides in part:

> ...In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity.

It is significant that the ordinance uses language authorizing limited detention and transportation, rather than a full blown arrest. Officer Bednark, however, made a full arrest and conducted a pat down that even exceeded the *Terry* standard of a "limited search of the outer clothing...in an attempt to discover weapons which might be used to assault him." *Terry v. Ohio*, 392 U.S. 1, 30; 88 S. Ct. 1868; 20 L.Ed.2d 889 (1968).

Officer Bednark found and confiscated a soft plastic bag of marijuana from inside a shirt pocket (A. 9) and a packet of Marlboro cigarettes (in which was found phencyclidine) inside another pocket (A. 12). No where in the transcript of the Preliminary Examination (A. 3-15) is there a single mention of the officer searching DeFillippo for weapons or having the least reason to suspect that he was armed.

Was the patrolman acting in good faith or is it more possible that his actions resemble those of Officer Martin in *Sibron v. New York*, 392 U.S. 40; 88 S. Ct. 1889; 20 L.Ed.2d 917, whose acts were condemned in the following language:

> The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of a self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. *Sibron v. New York*, 393 U.S. at 64.

Lastly, does the State of Michigan contend that the officer's good faith reliance upon an ordinance should begin and end with this one isolated section of the Detroit City Code? Should not Officer Bednark have placed equal good faith in the section immediately following 39-1-52.3? It states:

> When a police officer has stopped a person for questioning pursuant to Section 39-1-52.3 and has reasonable cause to believe there is danger to himself or others, *he may conduct a limited search of that peson for dangerous weapons.* Detroit City Code, 39-1-52.4.

Officer Bednark though cognizant of his powers under a Stop and Identify ordinance also ignored two other provisions of the City Code. Section 1-1-9 declares that "each resident of Detroit...enjoys...and it is the public policy of the city to recognize, respect and protect...the right to privacy..."

Detroit City Code 39-1-52.5 requires that:

> ...in enforcing sections 39-1-52.3 and 39-1-52.4, the Detroit Police Department and the individual police officer will take special care not only to honor the rights of citizens as defined in the United States Constitution but also to safeguard the personal dignity of those affected by it.

Had Officer Bednark applied his good faith reliance equally to the above provisions of the Detroit City Code, the law of the State of Michigan and the Fourth Amendment, it is submitted that respondent DeFillippo would not have been stopped, searched or arrested. Since neither the City Council nor the arresting officer demonstrated "complete good faith"[28] in enacting this ordinance or in arresting Gary DeFillippo, the decision of the Michigan Court of Appeals was correct.

IV.

THIS CAUSE MAY BE RSOLVED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

It must here be emphasized that a violation of the state statute by the Council could have provided an adequate independent state ground for decision by the Michigan Court of Appeals. Though the matter was raised in this respondent's brief before the Michigan Court, the issue was not reached for decision. Respondent may however reassert the issue and suggest the propriety of remand to the

[28]See Michigan v. Tucker, 417 U.S. 433, 446; 94 S. Ct. 2357; 42 L.Ed.2d 182 (1974).

Michigan Court of Appeals for further proceedings. Cf. *Smith v. Digmon*, ____ U.S. ____ , 98 S. Ct. ____ , 54 L.Ed.2d 582 (1978).

It could also be noted that the Michigan Court of Appeals cited to both state and federal authority in reaching its decision in *DeFillippo* and the state authority cited made reference to the term "our constitution" without clarification.[29] Under these circumstances remand to the state courts to determine whether the reference was to the United States or Michigan Constitution is an appropriate exercise of judicial restraint as practiced by this Court. *California v. Krivda*, 409 U.S. 33, 93 S. Ct. 32, 34 L.Ed.2d 45 (1972).

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[29]*People v. DeFillippo*, 80 Mich. App. 197; 262 N.W.ed 921 (1977), citing *Pinkerton v. Verberg*, 78 Mich. 573, 584; 44 N.W. 479, 582-583 (1889).

CONCLUSION

Wherefore, Respondent requests that this Court affirm the decision of the Michigan Court of Appeals, hold Detroit City code 39-1-52.3 unconstitutional and rule the search incident to an arrest under that ordinance unlawful. Alternatively, Respondent requests this Court to remand this cause to the Michigan Court of Appeals to determine the existence of adequate independent state grounds for the decision of that court.

Respectfully submitted,

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